APPEAL NO. 92082
FILED APRIL 10, 1992

A contested case hearing was held on February 5, 1992, at _____, Texas, (hearing officer) presiding as hearing officer. He determined that the respondent and cross-appellant, claimant below and hereinafter called claimant, suffered an injury in the course and scope of her employment with appellant and cross-respondent, employer below and hereinafter called employer, but that claimant failed without good cause to notify employer of the injury not later than the 30th day after the date on which the injury occurred. Accordingly, he determined the claimant was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The employer, a self-insured entity, appealed on the issue of the hearing officer's determination that the appellant suffered an injury in the course and scope of her employment and urges such determination was against the great weight and preponderance of the evidence. The employer also responds to the claimant's appeal on the issue of failure, without good cause, to timely notify in which appeal the claimant urges the evidence established good cause. The employer urges the evidence was sufficient to support the hearing officer's decision that there was no good cause for the failure to timely notify. Claimant also urges in response to the employer's appeal on the issue of an injury being sustained within the course and scope of employment that there is evidence to support the hearing officer's determination.

DECISION

Finding that the determination of the hearing officer on each of the issues raised by the employer and claimant were not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust, we affirm.

The claimant testified she worked as a food service assistant for employer, her duties included picking up, carrying and placing in storage various food stuffs. She claims that on (date of injury), she was performing her duties by lifting and placing a case of frozen french fries (weighing either about 30 or 50 pounds) in the freezer when she felt a sharp pain in her lower back. (In her Notice of Injury form, TWCC-2, undated but sent as an attachment to correspondence dated April 2, 1991, she states she was carrying a case of ground beef weighing approximately 50 pounds.) At the time of the incident, she told a coworker, Ms. W that she had hurt her back. She stated the pain went away but the next day the pain started down her left leg. At another point in her testimony she stated that she heard a "pop" in her back and all the pain went to her leg. She testified she did not report this to any supervisor because she "thought it was the same problem she had before except I'd never had the leg pain before." In this regard, she indicated she had gone to the hospital before because of muscle spasms and that she would have the spasms at home.

She worked the "next few days" after (date of injury) and went to the emergency room at (hospital) on January 11th because of pain in her lower back and legs. The hospital

report dated "1/11/91" indicates sharp left leg pain radiating down leg with "φ trauma" and duration or onset as five days. Her last day to work was January 15, 1991, and on January 16th she again went to the emergency room. The hospital report for "1/16/91" indicates left hip pain and muscle tightness. It also indicates "Pt does not remember any inciting event but has had pain since last summer" which was resolved with symptomatic treatment "until it started again in 12/90." The report indicates no point tenderness or tenderness on palpation of the back and concludes "musculoskeletal pain involving left hip." Flexeril and Motrin were prescribed.

The claimant either didn't remember or denied that she told the examining physician at the emergency room that she had been in pain for five days on the January 11th visit or that it was of two weeks duration when she was there on January 16th. She said all she told the doctors was that she had neither been in a car wreck nor had she fallen. She also doesn't remember them asking about an "inciting event" or that she indicated she has had pain "since last summer." Although her signature appears on the hospital reports, she states she signed them in blank. She also testified that in February she was told by a doctor that her pain was a result of arthritis.

The claimant testified that in early March 1991, and after having had an x-ray of her back, she was advised she had a disc injury to her back, that she had a bulge in disc L4-5. The hospital district report dated "3/1/91" indicates "prob H N P L4-5 left, degen. disc disease L4-5 & L5-S1."

On March 5th she advised her supervisor, Ms. Y, that she had a disc bulge and that she injured it in the freezer.

On cross-examination, the claimant stated she knew she had hurt her back on (date of injury), that she heard a "pop" and that she was supposed to report an injury. The reason she didn't report it was because she "couldn't connect the two together because I was having all the pain in the leg rather than back" and it could have been her old back pain going back to 1990.

The claimant testified that she told a friend, Ms. T about her back pain several days after (date of injury) and that Ms. T had to drive her to the emergency room on January 16th. Ms. T testified that she took claimant to the hospital on both January 16th and 27th because the claimant was having pain in the back of her leg and couldn't stand any length of time. Ms. T stated she asked the claimant about lifting anything at work and suggested, when claimant said "No" and that all she had lifted was groceries, that maybe the claimant had made an "awkward twist or pick up" of the groceries. Ms. T said that claimant didn't think the lifting, which she had been doing for eight to 10 years, hurt her "until the x-rays."

A sworn interview of Ms. Y was admitted into evidence. In it she stated she knew nothing of any injury to the claimant but that the claimant called "a couple of weeks ago" (apparently a couple of weeks from April 12, 1991) and said a doctor told her, the claimant,

that she was injured on the job and that she, the claimant, wanted Ms. Y to fill out a form for her. Ms. Y stated she told the claimant that "[Claimant], you have never been injured on the job, so I can't fill out the form for you." The claimant responded "I know, but I'm just, the doctor said for me to get a form." Ms. Y said that there was some lifting of supplies in the claimant's work but that they were not to pick up, and they knew it, more than 20 pounds.

A Ms. W, who had been properly subpoenaed by the claimant, did not appear at the hearing. Over objection by the employer, her signed but unsworn and undated, except for a notation in different writing of "6-91," statement was admitted into evidence. It provided:

To Whom it May Concern,

In early January [claimant] and I were in the freezer lifting boxes. [Claimant] complained of a sharpe (sic) pain in her back. She just stood there a while (sic) as if she was in real pain. While I continued to do the work in the freezer.

The employer, as indicated, objected to this statement as hearsay, as being unsworn and as being so brief it doesn't say much and raises more questions that it answers. The employer, although not separately raising an issue on the admission of this statement on appeal, does state that this "improperly admitted evidence being a timely objected to handwritten non-Affidavit" . . . "did not meet the level required of evidence to either meet the burden of proof or to overcome the great weight of the evidence principally being the employer's" hospital reports with the histories set out above.

While we are very concerned with the nonappearance of an important witness (under the circumstances in this case) we also question the advisability of admitting a statement such as this with absolutely no indication or explanation as to how it was obtained, by whom it was obtained, when it was obtained, and under what circumstances it was obtained. While Article 8308-6.34(b) does not require witness statements be sworn and Article 8308-6.34(e) specifically provides that "[t]he hearing officer may accept written statements signed by a witness . . .", there surely needs to be some indicia of reliability. *See* Texas Workers' Compensation Commission Appeal No. 91020, decided September 25, 1991. At best, that is minimally met here. In this regard, it is significant that the authenticity of the statement has not been attacked, that is, that it was made and signed by the person by whom it purports to be made and signed. Under the circumstances, we can not say the hearing officer went outside his authority in admitting the statement. However, the better avenue, with the evidence in the state it was in, would have been to obtain a more reliable form of this particular evidence.

The hearing officer, being the sole judge of the weight and credibility to give the evidence admitted (Article 8308-6.34(e)), could determine that this evidence had some or limited probative value and together with the other evidence, mainly the testimony of the claimant and the medical report of March 1, 1991, was enough to meet the preponderance level. It goes without saying, there was conflicting evidence and, indeed, some conflicts

within the testimony of the claimant. The hearing officer resolves these conflicts and finds the facts in the case. *See* Texas Workers' Compensation Commission Appeal No. 92067, decided April 3, 1992; Burlesmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). That an appellate body might draw inferences and arrive at conclusions different from those the fact finder deemed most reasonable and that the record contains evidence of, or gives equal support to, inconsistent inferences, such is not a sufficient basis for reversal. *See* Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The determination of the hearing officer on the issue of an injury in the course and scope of employment is not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986); In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

Regarding the hearing officer's determination that the claimant failed, without good cause, to report her injury not later than the 30th day after the date on which the injury occurred, we find there was sufficient probative evidence to sustain his decision. We note in this regard, the contested handwritten statement of Ms. W could reasonably be considered some supportive evidence that the claimant did not have good cause in her failure to timely notify. Ms. W states that while lifting boxes, the claimant complained of a "sharpe (sic) pain" in her back and that she just stood for awhile "as if she was in real pain." Other evidence that weighs against the claimant's assertion that she didn't believe the injury to be serious at the time or that it wasn't related to the lifting incident is the claimant's testimony that she heard or felt a "pop" in her back, felt immediate sharp pain and stated, "Oh, I hurt my back." On cross-examination, she acknowledged she knew on (date of injury) that she had been hurt and had a "pop" in her back and that she was supposed to report any injury. It is apparent the hearing officer did not believe the claimant's version of why she did not timely report her injury and thus found good cause did not exist. The inconsistencies within her testimony and between it and the medical records offered by the carrier were, again, matters for the hearing officer to resolve on this issue. Appeal No. 92067 *supra*. His conclusion that the claimant did not have good cause is sufficiently supported by the evidence. Texas Workers' Compensation Commission Appeal No. 91066, decided December 4, 1991; Texas Workers' Compensation Commission Appeal No. 92037, decided March 19, 1992; *see also* Texas Workers' Compensation Commission Appeal No. 91116, decided January 30, 1992.

The decision of the hearing officer is affirmed.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Joe Sebesta
Appeals Judge

_____
Robert W. Potts
Appeals Judge